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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 329

FAY HEASLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The District Court rendered no opinion. The opinion of the Court of Appeals (Pet. App. 1-10) is reported at 218 F. 2d 86.

JURISDICTION

The judgment of the Court of Appeals was entered on January 13, 1955. (Pet. App. 10.) On April 6, 1955, the Court of Appeals granted petitioner leave to file a petition for rehearing out of time. (Pet. App. 11.) The petition for rehearing

was denied on July 19, 1955. (Pet. App. 13.) The petition for a writ of certiorari was filed on August 18, 1955. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether the instructions to the jury on the Government's corroborative net worth proof, to which no objection was made in the trial court, were erroneous.

2. Whether the trial court erred when it explained to the jury that petitioner's income tax returns for years prior to the prosecution period were not introduced to show that petitioner had violated the income tax laws in those years, but only to establish a net worth starting point.

3. Whether there was sufficient evidence to support the jury's findings of wilfulness.

STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed

by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U.S.C. 1952 ed., Sec. 145.)

STATEMENT

On September 27, 1952, a four-count indictment was returned against the petitioner in the United States District Court for the District of North Dakota, charging him with wilfully attempting to defeat and evade a large part of his income tax for the years 1946 through 1949, in violation of Section 145(b) of the Internal Revenue Code of 1939. The indictment alleged the following to be the amounts of adjusted gross income and the income tax liability, as reported by the petitioner in his return and as corrected. (R. 1-3):[1]

Year	Reported income	Reported tax	Corrected income	Corrected tax
1946	$4,071.03	$317.00	$31,563.58	$12,007.45
1947	4,782.95	150.50	43,368.90	19,093.14
1948	2,939.28	240.00	58,164.78	27,518.36
1949	608.31	.....	16,441.59	3,828.72
Total	$12,401.57	$707.50	$149,538.85	$62,447.67

On February 12, 1954, after a trial lasting eight days, the jury returned a verdict of guilty on

[1] References to the printed record will be designated "R." References to the reporters' transcript of the evidence, which has been certified to this Court, will be designated "Tr."

counts 1, 2, and 3 and not guilty on count 4. (R. 37.) Petitioner was sentenced to a term of imprisonment for three years on each count, the sentences to run concurrently. (R. 38.) The Court of Appeals unanimously affirmed. (Pet. App. 10.)[2]

The evidence may be summarized as follows:

Direct proof of evasion. With the exception of four or five cancelled checks, petitioner, who earned his income from farming operations, furnished no books or records to the agent investigating his tax returns. He told the agent that although he had kept his original records, he had stored them in his attic where almost all of them had been destroyed by rats and mice. (Tr. 15.) Petitioner later told the agent that he could find no records at all, and testified at the trial that he had kept his original records in a pasteboard box, but could no longer find them. (Tr. 480.)

Without any records, the Government was forced to make exhaustive investigations to ascertain the amounts of income petitioner had received and the expenditures he had made. The Government proved the amount charged in the indictment by

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[2] After the period allowed by the Rules of the Court of Appeals to petition for rehearing had elapsed, petitioner requested leave to file an out of time petition for rehearing. The Court of Appeals granted leave (Pet. App. 11) and requested briefs from the petitioner and the Government on the question whether the net worth decisions of this Court (*Holland* v. *United States*, 348 U.S. 121; *Friedberg* v. *United States*, 348 U.S. 142; *Smith* v. *United States*, 348 U.S. 147; *United States* v. *Calderon*, 348 U.S. 160) called for a different result from that already reached. (Pet. App. 12). The Court denied the petition for rehearing (Pet. App. 13.)

showing what sums the petitioner had received during each year in question. The agents examined the records of all elevator companies, county agricultural offices, banks, creameries, public offices and other concerns with which it was considered likely that petitioner had done business. (Tr. 18.) In this way, the agents ascertained petitioner's income from sales of grain to elevators and grain companies (Tr. 191-202, 204-206, 209-214, 214-216, 217-218), sales of butter fat to creameries (Tr. 239-244), emergency wheat and dairy subsidy payments from the Commodity Credit Corporation (Tr. 278), soil conservation payments from the Agricultural Stabilization and Conservation Office (Tr. 278), and payment for services to the county (Tr. 206-208). Petitioner understated his receipts by $20,127.78 in 1946. In 1947 and 1948 he failed to report $31,620.82 and $41,471.21 in receipts. (Ex. 88; R. 22-25.) The Government's direct evidence of specific receipts thus showed that petitioner had received a total of $93,219.81 which had never found its way into his income tax returns.

The Government also proved that petitioner had overstated his deductible expenses, showing that the expenses set out in his returns substantially exceeded those allowed. (Tr. 258.) This evidence showed that petitioner had overstated his deductible expenses by $2,150.73 in 1946, $6,965.13 in 1947, and $13,634.29 in 1948. (Ex. 88, R. 22-25.)

In sum, combining unreported receipts and overstated expenses, the Government's evidence showed the following understatements of taxable income

for each of the prosecution years. (Ex. 88, R. 22-25.)

Year	Understatement of income
1946	$22,278.51
1947	38,585.95
1948	55,225.50
Total	$116,089.96

Petitioner attempted to show that part of these receipts were from property he had originally owned but had transferred to his son. (Tr. 384-386.) This was countered by proof that he had claimed the son as a dependent in his income tax returns. (Tr. 504.) In addition, the son testified that he did not fill out his own returns or pay his own tax and had no idea of what his tax liability was, leaving all this to his father. (Tr. 586-592.) The evidence showed only a small amount of income reported in the son's returns. (Tr. 593-607.) Furthermore, all the property in question was recorded under petitioner's name. Petitioner's claim that the land was owned by his children rested solely on unrecorded deeds. (Tr. 384-386.)

Since 1942 petitioner had engaged John Schoonover, an accountant, to fill out his income tax returns. (R. 21.) Schoonover, who had died by the time of the trial, apparently made no independent audit, but used the figures furnished by petitioner. (Tr. 476.) Petitioner testified that he had delivered all of his records to Schoonover each year and had relied on his advice. (Tr. 476.)

Indirect proof of tax evasion. The Government relied on the direct proof of income tax evasion described above, and the trial court so charged the jury. (R. 30.) In addition to and in corrobora-

tion of the direct proof, the Government also prepared an analysis of petitioner's net worth. On May 17, 1950, an agent met with the petitioner in the office of the Deputy Collector of Internal Revenue, Jamestown, North Dakota. Working with petitioner, the agent prepared a statement of petitioner's net worth as of December 31, 1943. (R. 8.) All of the figures, except for cash in the bank, were supplied by petitioner from his memory. (R. 10.) The bank balance figure was read to petitioner, and he confirmed it. (R. 9.) The completed net worth statement was shown to petitioner, and he signed a statement certifying it as a complete list of his assets and liabilities as of January 1, 1944. (Ex. 11, R. 14-15.) He certified that he had been warned that the Government could use the statement in any way it saw fit and that the information was voluntarily given. He also stated that since January 1, 1944, neither he nor his wife had been given any money or inherited any. (Ex. 11, R. 14-15.)

Using the statement as a starting point, with the aid of income tax returns filed by petitioner for 1944 and 1945, the Government made an analysis of petitioner's net worth increases for the years 1944 through 1949. (Ex. 82, R. 16-17.) This analysis showed that petitioner had adjusted gross income in 1946, 1947, and 1948 far exceeding the amounts reported on his returns.

ARGUMENT

Though it is not questioned, and, indeed, is scarcely mentioned in the petition, there was ex-

tensive direct proof in this case that petitioner had received large amounts of taxable income which he had never reported. (Ex. 88; R. 22-25.) These sums included payments from grain elevators, creameries, and local and federal agencies. (See Statement, *supra*, p. 5.) The Government submitted a net worth computation (Ex. 82; R. 16-17), but the investigating agent testified that the Government did not rely primarily on it and submitted it only to corroborate the direct evidence of tax evasion. (R. 19.) The trial court so instructed the jury. (R. 30-31.) Thus, the principles of this Court's recent net worth decisions (*Holland* v. *United States*, 348 U.S. 121; *Friedberg* v. *United States*, 348 U.S. 142; *Smith* v. *United States*, 348 U.S. 147; and *United States* v. *Calderon*, 348 U.S. 160) are at most of secondary importance here. But even apart from this crucial defect in the petition, the questions raised are unsubstantial. The net worth evidence was properly received and adequately explained to the jury in a charge (R. 29) to which the objections now presented were never raised in the trial court. And there is no merit in the claim that wilfulness was not sufficiently proved because petitioner's returns were prepared by an accountant; the jury had ample grounds to find that petitioner had not disclosed his unreported income to the accountant.

1. Petitioner claims that the trial court erred in not instructing the jury as to the weaknesses of the net worth starting point. (Pet. 10.) He made no such objection at the trial and could show a

basis for reversal now only by establishing that there was plain error affecting his substantial rights. (Rules 30 and 52, Federal Rules of Criminal Procedure.) Far from making such a showing, petitioner merely asserts that, with one exception, he furnished the starting point figures from memory in an extra-judicial statement voluntarily made to Government agents. (Pet. 8.) Since petitioner produced no records (see Statement, *supra,* p. 4), his own statement, made with the realization that the Government could use it against him (Ex. 11; R. 14-15), supplied the best possible source of information as to his opening net worth. Petitioner now claims that his memory may have been faulty, but it was for the jury to consider all the circumstances surrounding the giving of the statement and to give it whatever weight it deserved. *United States* v. *Calderon,* 348 U.S. 160, 163.

Moreover, the Government's direct proof that petitioner had received specific items of income amounting to many thousands of dollars which he never reported (Ex. 88; R. 22-25) corroborated the extra-judicial statement of opening net worth. As this Court pointed out in *Smith* v. *United States,* 348 U.S. 147, 158, independent evidence which tends to establish the crime without resort to the net worth computation can serve as corroborating evidence.

The trial court's charge is also criticized in the petition, again for the first time, on the asserted ground that the significance of the starting point

was not adequately explained. (Pet. 11.) However, the court told the jury that the increases in net worth could be considered to be net income only if "there is a fixed starting point at which the taxpayer's financial condition can be affirmatively established". (R. 29.) The court further charged the jury that it was incumbent upon the Government to prove beyond a reasonable doubt that the increase in net worth did not come from a surplus in prior years. (R. 29.) He cautioned that the starting point net worth must be satisfactorily established in order to foreclose the hypothesis that the net worth increases were derived from prior accumulations. (R. 29.) Petitioner finds fault with the words "satisfactorily established," arguing that it was error for the court not to instruct the jury that the starting net worth must be established with "reasonable certainty." (Pet. 11.) But this is a semantic quibble. The jury was amply instructed on the requirement of proof beyond a reasonable doubt, and the difference between a starting point "satisfactorily established" and one proved with "reasonable certainty" could hardly justify reversal on petitioner's belated objection.

The only mention that the petitioner makes of the Government's direct evidence comes as an attempt to cast doubt upon the reliability of the net worth computation on the ground that the latter yielded results greatly exceeding the amounts of unreported income that the Government proved

directly. (Pet. 12.) This argument would have substance only if (1) the Government were required to prove the exact amount of taxes evaded or (2) it had to be assumed that the amounts established by direct proof were all petitioner failed to report. But petitioner concedes, as he must (Pet. 12), that proof of the exact amount evaded is not required. And there is no basis for assuming that the Government's direct proof succeeded in showing the full extent of the evasion. Moreover, since the Government relied primarily on its direct evidence, which showed a smaller but still substantial amount of tax evasion in each year, petitioner has no ground to complain. The decisive point is that both groups of evidentiary facts—the direct proof, primarily relied upon, and the corroborative net worth evidence—established large amounts of unreported income. Cf. *Smith* v. *United States,* 348 U.S. 147, 151-152.

Petitioner next attacks the Government's computation of net worth by references to portions of the testimony designed to show that the Government's figures were inaccurate. (Pet. 12-15.) However, the asserted inaccuracies were for the jury to consider, and petitioner's argument amounts only to a disagreement with the inferences the jury was entitled to draw. The Government's evidence refuted petitioner's explanation that some of his receipts, proved by direct evidence to have been unreported, were from land belonging to his children. (See Statement, *supra,* p. 6) As to the alleged, but not proved, overlap between

land and fencing and other buildings in the Government's net worth computations (Pet. 12-14), even if the computations had erred in this respect, the balance of the net worth increases remained unchallenged and was clearly great enough to support the jury's finding that petitioner had substantial amounts of unreported income. There is thus no reason for further review of the evidence by this Court.

Also without merit is petitioner's contention that the court allowed the jury to take the net worth statement into the juryroom without guarding instructions (Pet. 18), and even gave added dignity to the exhibit by the remarks petitioner quotes (Pet. 16). The court pointed out that Exhibit 82 was only a claim by the Government to be a summary of the evidence received. (R. 30.) This riveted the jury's attention on the actual evidence it had heard, and suggested no basis for a belief in the mind of a reasonable juror that the document itself had evidentiary weight. The brief remarks petitioner quotes merely gave an accurate description of the exhibit and of its limited purpose; they plainly fail to justify the assertion (Pet. 16) that their effect was "to strengthen its impact and dignify its significance."

2. The Government introduced petitioner's income tax returns for 1944 and 1945 to help bridge the gap between the opening net worth statement and the first prosecution year. (Tr. 167-168.) The trial judge instructed the jury that the returns were introduced solely in establishing a

starting point and were not designed to claim that petitioner had violated the income tax laws in those years. (R. 30.) There is no merit in the claim (Pet. 19-20) that this was reversible error because it gave the jury the impression that these returns were conclusive proof of the validity of the Government's opening net worth statement.

Again, it is significant that there was no objection to this passage in the instructions; but an objection would have been groundless in any event. The first prosecution year was 1946, and it was obviously necessary for the Government, which had used petitioner's admission of his net worth at the close of 1943 as a starting point, to show what his income was during 1944 and 1945. We think it clear that this is the only interpretation a reasonable jury could have put upon the passage of which petitioner complains.

3. Finally, petitioner presents the question (Pet. 4) whether his failure to report most of his income could properly have been found wilful inasmuch as he left the preparation of his returns to an accountant who had died before the trial. Neither the question nor the argument that it is an important one warranting certiorari (Pet. 23) is substantial.[3]

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[3] Though it is not presented as an issue for review, there is some argument in the petition (p. 22) that the charge on wilfulness was inadequate. However, the trial court carefully explained that the net worth computation was merely an effort to show unreported income (R. 29), and that the jury could convict only if it found that petitioner had understated his income with a criminal intent to escape the payment of

The issue before the jury on this aspect of the case was simply whether petitioner had deliberately and wilfully misstated his income to his accountant, and thus had known that the returns, prepared by the accountant and signed by petitioner, were false. In addition to its consideration of the evidence showing understatements of income in substantial amounts, the jury heard petitioner's testimony, had opportunity to observe him, and was entitled to pass judgment on his credibility. The records petitioner had allegedly given to the accountant might have thrown further light on the question, but petitioner testified that they had disappeared or had been destroyed by mice. (See Statement, *supra*, p. 4.) In view of the great size of the understated income over a three-year period and petitioner's shifting and questionable explanation for the disappearance of his records (cf. *Spies* v. *United States*, 317 U.S. 492, 499), the evidence amply supports the jury's inference of wilfulness.

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tax rather than through mere error or negligence (R. 32). These instructions were clearly adequate. They certainly could not constitute the kind of plain error warranting reversal now in view of petitioner's failure to make timely objection.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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